No. 17-1104

In The Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., ET AL.,

Petitioners,

v.

ROBERTA G. DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PORT MINISTRIES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Port Ministries International (PMI) is an evangelical association of port missionaries that provides spiritual, relational, and educational support to those who minister to international seafarers in ports throughout the United States (with a growing presence in foreign countries). PMI members pursue their ministries in ports in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits. PMI members are also active in Canada, Great Britain, and American Samoa.

PMI members serve the physical, emotional, and spiritual needs of seafarers in a variety of ways, from conducting chapel services to supplying home-cooked meals and providing internet or telephone access so that seafarers may communicate with loved ones thousands of miles away. In their ministries, PMI members have observed the suffering of seafarers who have been injured by defective products as a result of the negligence of others who did not make, sell, or distribute the defective products.

All seafarers would suffer if those subject to the general maritime law were excused from their "duty of exercising reasonable care under the circumstances of each case." *Kermarec v. Compagnie Generale*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* confirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus* briefs.

Transatlantique, 358 U.S. 625, 632 (1959). If negligent vessel owners and operators were no longer responsible for the consequences of their negligent behavior, for example, they would no longer have the appropriate incentive to take precautions to protect seafarers from defective products on board their vessels. All seafarers would accordingly be exposed to greater risks.

Because PMI's members are concerned for the well-being of all seafarers and they wish to ensure that all seafarers continue to be protected from negligent behavior, *amicus* has a strong interest in preserving the principles of maritime law that this Court has applied since its decision almost sixty years ago in *Kermarec*. It therefore files this brief to urge the Court to reject the rule advocated by petitioners.

SUMMARY OF ARGUMENT

1. It is important to recognize the procedural posture of this case and the issue actually before the Court. At this stage of the proceedings, there is no question of strict liability; that issue has already been resolved in petitioners' favor. This is now a pure-and-simple maritime negligence case. It is governed by the general maritime law, which differs from the common law. And the negligence standard under the general maritime law has been well-established for almost sixty years.

In the current procedural posture, this Court must view the facts in the light most favorable to the

plaintiff respondents.[2] Petitioners' merits arguments are currently irrelevant. The question before this Court is whether negligent defendants (no matter how negligent they may be) can automatically escape the consequences of their own negligence under a "bare metal" exception to this Court's well-established principles of maritime law.

2. This Court established the proper standard for determining negligence under the general maritime law in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959): "reasonable care under the circumstances of each case."

In adopting that single standard, the *Kermarec* Court rejected the argument (which had been accepted by the Second Circuit below) to adopt a bright-line rule exonerating the negligent defendant in the specific context of the case.

The *Kermarec* standard is broadly recognized as the default rule in negligence cases under the general maritime law. This Court has recognized and applied the standard in a variety of contexts, including in product-defect cases based on negligence. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866 (1986).

3. The foreseeability test adopted by the Third Circuit is consistent with this Court's maritime

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[2] The term "plaintiff respondents" refers to those respondents who were plaintiffs in the district court, thus excluding respondent GE, which is technically a respondent by virtue of this Court's Rule 12.6 although its interests align with petitioners'.

decisions recognizing foreseeability tests. In *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 879 (1997), a product-defect case, the Court explicitly adhered to a foreseeability test for determining liability. This Court has also adopted foreseeability tests under the general maritime law in other contexts.

Petitioners fail to appreciate the context of the present case when they quote *East River* for the proposition that "'foreseeability is an inadequate brake'" in products liability cases. Pet. Br. 35 (quoting *East River*, 476 U.S. at 874). This case is a personal-injury case. The *East River* Court was discussing only claims for purely economic losses.

Petitioners misapprehend maritime law's uniformity principle when they argue that the Third Circuit's "open-ended, unpredictable test" would undermine the uniformity favored by maritime law. It is not uniformity of expected outcome that is central to the needs of federal maritime law, but rather uniformity in the tests to be applied by courts throughout the country. This Court has frequently adopted "open-ended" tests in which the results in individual cases will vary according to the facts of those cases. Nothing in maritime law's uniformity principle requires the kind of bright-line test that petitioners seek here.

4. Petitioners advocate a radical new rule that goes well beyond the facts of the present case. If adopted by this Court, petitioners' proposed rule would protect even a grossly negligent vessel owner that purchases a defective product—but did not "make, sell, or

distribute" that product—and knowingly uses the defective product on the vessel without repairing it or warning crew and passengers of the dangers. That has never been the general maritime law rule. On the contrary, this Court has already permitted plaintiffs injured by defective products to recover from negligent defendants who did not "make, sell, or distribute" the products that caused the injuries.

ARGUMENT

I. IN ITS CURRENT POSTURE, THIS IS NOT A STRICT-LIABILITY PRODUCTS CASE BUT A MARITIME NEGLIGENCE CASE

Petitioners make a Herculean effort to suggest that this is an envelope-pushing products-liability case, apparently hoping to evoke an image of blameless defendants being held responsible under a strict-liability theory for injuries that were not their fault. Nothing could be further from the truth. Despite petitioners' efforts to obscure the nature of this case, the record is clear.

This is now a pure-and-simple negligence case. Plaintiff respondents originally asserted both strict-liability and negligence claims, Pet. App. 4a, but the district court dismissed both claims, *id.*, and the court of appeals affirmed with respect to the strict-liability claim, *id.* at 10a. As a result, strict liability is no longer an issue. Although it is difficult to tell from the petition itself, petitioners necessarily sought review only on the negligence ruling because that is

the only issue on which they did not prevail below. Plaintiff respondents, far from cross-petitioning to keep their strict-liability claims alive, explicitly conceded that "[t]his is a negligence case, and only a negligence case." Br. Op. 7.

Petitioners also rely heavily on what they call "well-settled tort law principles," Pet. Br. 19, although it is undisputed that the general maritime law[3] governs plaintiff-respondents' claims, *e.g.*, Pet. Br. 18; Pltf-Resp. Br. 26-27. Even if petitioners were correct in their understanding of the common-law principles (a questionable assumption), "[t]he common-law duties of care have not been adopted and retained unmodified by admiralty, but have been adjusted to fit their maritime context." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001) (citing *Kermarec*, 358 U.S. at 630-632); *see also, e.g.*, *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 168 n.14 (1981) ("maritime negligence actions are not necessarily to be governed by principles applicable in nonmaritime contexts") (citing *Kermarec*).

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[3] The "general maritime law" is judge-made law—a form of federal common law. *See generally, e.g.*, *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-865 (1986). The general maritime law is a subset of federal maritime law, which also includes statutory law (such as the Jones Act, 46 U.S.C. § 30104). Because no federal statute applies here, this case is governed by the general maritime law. In this brief, however, *amicus* will often speak more generally about "maritime law," thus including both the general maritime law and statutory maritime law.

Recognition that this is simply a maritime negligence case—not a common-law strict-liability case—makes the analysis more straightforward, for the maritime-law principles governing negligence cases are already well-established. It is nevertheless important to focus on the actual issue before the Court. Petitioners devote much of their brief to arguing, in essence, that they were not at fault. One consistent theme is that the Navy was the negligent party. That argument is undoubtedly open to petitioners on remand; if they were not negligent, they will not be liable for plaintiff-respondents' injuries. But the argument is irrelevant here. In the current procedural posture, this Court must draw "'all justifiable inferences'" in plaintiff-respondents' favor. *E.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The actual question before this Court is whether negligent defendants (no matter how negligent they may be) can automatically escape the consequences of their own negligence under a "bare metal" exception to the principles of general maritime law that this Court has long recognized.

To achieve their desired result, petitioners propose an extraordinarily broad new rule that goes far beyond the facts of this case. Because this is simply a negligence case, however, no new rules are necessary. The standard of liability under the general maritime law has been firmly established for almost six decades. This Court need simply instruct the district court to apply that familiar standard on remand.

II. THIS COURT ESTABLISHED A SINGLE STANDARD OF LIABILITY FOR NEGLIGENCE UNDER THE GENERAL MARITIME LAW ALMOST SIXTY YEARS AGO

The general maritime law has long recognized a cause of action for negligence. *See, e.g., Leathers v. Blessing*, 105 U.S. (15 Otto) 626, 630 (1882) (recognizing liability at maritime law for "wrongs suffered in consequence of the negligence or malfeasance of others"); *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150, 156 (1829) (recognizing defendants' liability for the drowning deaths of four slaves if "caused by the [defendants'] negligence"). And this Court established the proper standard for determining negligence in 1959.

In *Kermarec*, this Court announced a single standard of liability for negligence—rejecting arguments for a special rule in special circumstances—and that standard has governed maritime negligence cases ever since. This Court should continue to adhere to its well-established precedent.

A. *Kermarec* Established the Standard of "Reasonable Care Under the Circumstances of Each Case," Thus Making Defendants Liable for the Consequences of Their Own Negligence

Joseph Kermarec fell down a stairway and fractured his hip while visiting a crewman on the *S.S. Oregon*, a passenger vessel belonging to Compagnie Generale Transatlantique. In his subsequent action for damages, which alleged that the vessel owner had been

negligent in maintaining the stairway, the jury found in his favor. The district court set aside the jury verdict, however, ruling that the evidence was insufficient to establish liability to a gratuitous licensee under New York law. A divided Second Circuit affirmed.

This Court unanimously reversed. Because the injury occurred "aboard a ship upon navigable waters," the case was governed by maritime law, not state law. 358 U.S. at 628.[4] And under the general maritime law, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632. With that holding, this Court established a single negligence standard under the general maritime law.

B. The *Kermarec* Court Expressly Rejected Arguments for Special-Purpose Bright-Line Rules That Would Impose Different Duties in Different Contexts

The principal dispute in *Kermarec* was over the proper standard to apply in deciding the claim. Much like petitioners in this case, the *Kermarec* defendant argued that it should benefit from a special bright-line rule applicable in the narrow context of that case. In particular, it argued that Mr. Kermarec, as a social visitor, was a "mere licensee," and—under the common

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[4] The *Kermarec* choice-of-law conclusion was not a landmark ruling. The proposition that maritime law applied in that context was already well-established. *See, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-411 (1953).

law's hoary rules for invitees, licensees, and trespassers—a vessel owner was therefore not liable for its negligence in causing his injury. *See* Brief for Respondent at 5-9, *Kermarec* (No. 22). Citing twenty-one state decisions in the course of its analysis, the *Kermarec* defendant concluded that "the cases uniformly hold that except for wanton or willful negligence, or for the maintenance of a trap, or for affirmative negligence created after the arrival on the premises, even one visiting with the owner of the premises may not recover." *Id.* at 9.

The *Kermarec* defendant also argued that, if maritime law governed, the common law's special rules for invitees, licensees, and trespassers should still apply. *Id.* at 9-11. It distinguished this Court's decision in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), on the ground that the injured plaintiff in that case was a business invitee. *Id.* at 10-11. "[D]ifferent people in different relationships aboard a vessel have different rights." *Id.* at 11.

The Second Circuit applied the bright-line rule that the *Kermarec* defendant advocated. That court concluded "that Kermarec was a mere licensee." The defendant "did not invite him aboard for any 'business' purpose." *Kermarec v. Compagnie Generale Transatlantique*, 245 F.2d 175, 177 (2d Cir. 1957), *rev'd*, 358 U.S. 625 (1959). And "[t]he general rule" does not impose liability on the shipowner for negligence; its more limited duty is not to "willfully or wantonly injure a licensee, or expose him to hidden perils or fail to use

due care to prevent injury to him after discovering that he is in danger." *Id.* at 178.

This Court unanimously reversed. After criticizing the common-law distinctions as unjust and confused, the *Kermarec* Court explained that "[f]or the admiralty law . . . to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality." 358 U.S. at 631. Just as "the common law has moved . . . towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances,'" *id.* (quoting *Kermarec*, 245 F.2d at 180 (Clark, C.J., dissenting)), this Court decided that the general maritime law should impose a single "duty of exercising reasonable care under the circumstances of each case," *id.* at 632. Although the "circumstances of each case" will necessarily vary, the same standard for determining negligence is universally applicable in actions under the general maritime law.

C. This Court Has Applied the *Kermarec* Standard of "Reasonable Care Under the Circumstances of Each Case" Broadly to Negligence Claims Under the General Maritime Law

Although this Court's *Kermarec* decision specifically addressed only the case before it, the *Kermarec* statement of the proper standard has been extended broadly to negligence claims under the general maritime law. As Prof. David Robertson has explained, "*Kermarec* quickly came to stand for the much broader principle that all maritime actors presumptively owe

one another a duty of reasonable care." It "sets forth a general principle of negligence liability that supplies the default rule . . . for maritime cases of physical injury to persons and property." DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 129 (3d ed. 2015). Even maritime workers, whose primary remedies for personal injury are statutory, may still assert *Kermarec*-based negligence claims under the general maritime law against persons other than their employers. *See, e.g., Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. at 163 n.10.

This Court's decisions provide numerous examples to confirm the scholarly analysis. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), is particularly relevant. This Court treated the application of the *Kermarec* standard to products-liability cases as so obvious that extended discussion was unnecessary. The *East River* Court said simply:

> [T]o the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law. See *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S., at 632.

476 U.S. at 866. By citing page 632 of the *Kermarec* opinion, the *East River* Court unambiguously demonstrated its recognition that the *Kermarec* standard applies in products-liability cases "based on negligence" (such as the present case). Only a single substantive sentence of text appears on page 632, and it is the

sentence setting out the standard of "reasonable care under the circumstances of each case." *See Kermarec*, 358 U.S. at 632.

Even when this Court has reversed a decision of a lower court that applied the *Kermarec* standard, it has reaffirmed its acceptance of the standard. In *Scindia Steam Navigation Co. v. De Los Santos*, the court of appeals applied the *Kermarec* standard to rule in favor of a longshoreman in his negligence action against a vessel owner. *See* 451 U.S. at 163 n.10. This Court reversed and ruled for the owner, but it stressed that it did not reject the standard; it simply had a different view of how much care was reasonable under the circumstances of the case. *See id.* ("[T]he shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect cargo operations once the stevedore begins its work.").

Other examples of this Court's recognition of the applicability of the *Kermarec* standard in negligence cases under the general maritime law include *Garris*, 532 U.S. at 815 (citing only *Kermarec* as authority when discussing negligence as "a distinctively maritime duty"), and *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 414-417 (1969) (explaining how the *Kermarec* standard applies to a stevedore's counterclaim against a vessel owner for negligence causing the death of an employee of the stevedore on the vessel).

* * *

In sum, the single negligence standard that this Court established in *Kermarec* is widely recognized as the governing rule in negligence cases under the general maritime law, including in product-defect actions based on negligence. Establishing a new bright-line rule to govern a subset of those actions would be inconsistent with almost six decades of this Court's precedents.

III. THE THIRD CIRCUIT'S DECISION BELOW IS CONSISTENT WITH THIS COURT'S MARITIME DECISIONS

Petitioners argue that the foreseeability test adopted by the Third Circuit would undermine the uniformity that maritime law promotes because the court of appeals' "open-ended, unpredictable test is incapable of consistent application." Pet. Br. 51. Petitioners' concerns are misplaced. This Court has already adopted a foreseeability test governing liability in product-defect cases under the general maritime law, and has frequently adopted foreseeability tests in analogous contexts. Moreover, this Court has adopted many "open-ended" tests in maritime law. It is simply wrong to suggest that admiralty's need for uniformity requires "bright line" rules of the kind that petitioners propose. It is not uniformity of expected outcome that is central to the needs of federal maritime law, but rather uniformity in the legal standards to be applied in courts throughout the country.

A. This Court Has Already Adopted a Foreseeability Test in Product-Defect Cases Under Maritime Law

This Court has held that products liability is part of maritime law, and that when "products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law." *East River*, 476 U.S. at 866 (citing *Kermarec*, 358 U.S. at 632). Foreseeability is one of those principles.[5] To abandon the existing foreseeability test in favor of petitioners' "bright line" rule—or any rule that would shield manufacturers from liability for harm caused by components foreseeably added to their products by others—would be a substantial departure from this Court's maritime-law precedents.

In *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997), a case seeking damages caused by a vessel's defective hydraulic system, the Court

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[5] Petitioners misleadingly quote *East River* to the effect that "'foreseeability is an inadequate brake'" in products liability cases, Pet. Br. 35 (quoting *East River*, 476 U.S. at 874), but that statement referred specifically to claims for purely economic losses caused by defective products. The statement simply reiterated this Court's well-established rule precluding the recovery of purely economic losses in tort claims governed by maritime law because a foreseeability test could lead to potentially unlimited liability. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Foreseeability does not lead to potentially unlimited liability when property damage or personal injury is involved because the scope of foreseeable risk of physical harm is more constrained.

explicitly adhered to a foreseeability test for determining liability:

> The first principle is that tort law in this area ordinarily (but with exceptions) permits recovery from a manufacturer and others in the initial chain of distribution for *foreseeable* physical harm to property caused by product defects.

520 U.S. at 879 (emphasis added; emphasis in original omitted) (citing *East River*, 476 U.S. at 867). A foreseeability test is entirely consistent with the principles of maritime law, including the tradition of "simplicity and practicality."

This Court has also adopted a foreseeability test as part of the proximate-cause analysis in maritime cases in tort, holding that a cause is "superseding" when it is "a later cause of independent origin that was not *foreseeable*." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (emphasis added; internal quotation marks omitted). The *Sofec* Court acknowledged that there had been disagreement and confusion about the operation of the foreseeability-based doctrine of proximate cause but nevertheless adhered to it in maritime law as "a necessary limitation on liability." *Id.* at 838.

Chief Justice Roberts echoed the *Sofec* Court's conclusion with his recent observation that "[p]roximate cause is hardly the only enduring common law concept that is useful despite its imprecision." *CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 707

(2011) (dissenting opinion). Although the *McBride* Court applied a relaxed proximate-cause test for statutory claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, *Sofec* demonstrates that the traditional proximate-cause test—based on foreseeability—governs tort claims under the general maritime law.

Not only has this Court used a foreseeability test for proximate cause in maritime products liability cases, it has also preferred the use of "tort principles, such as foreseeability [and] proximate cause," which "already do, and would continue to, limit liability in important ways," *Saratoga Fishing*, 520 U.S. at 884, rather than an arbitrary bright-line "tort damage immunity" arising when a defective product is sold to a subsequent user, *id.* at 880. The *Saratoga Fishing* Court reasoned that the various tort rules that determine which foreseeable losses are recoverable aim to provide appropriate safe-product incentives that would be diminished by adoption of "a liability rule that diminishes liability simply because of some such resale." *Id.* at 881. The foreseeability test adopted by the Third Circuit—unlike petitioners' proposed rule—is entirely consistent with this Court's precedents on products liability in maritime law.

When this Court adjusted the principles of products liability law to fit the maritime context in *East River* and *Saratoga Fishing*, it firmly placed its faith in the concept of foreseeability as the appropriate limit on over-extensive liability.

B. This Court's Adoption of Many Open-Ended Tests Demonstrates That Maritime Law's Traditional Need for Uniformity Does Not Require Bright-Line Rules of the Kind Proposed by Petitioners

Petitioners argue that an "open-ended, unpredictable test" such as the foreseeability test adopted by the Third Circuit would undermine the uniformity favored by maritime law because it would be "incapable of consistent application." Pet. Br. 16, 51. Petitioners misapprehend maritime law's uniformity principle. Many of the tests that this Court has adopted in maritime law have been just as "open-ended," if not more so. But they are an established part of the fabric of the uniform maritime law. It is not uniformity of expected outcome that is central to the needs of federal maritime law, but rather uniformity in the tests to be applied by courts throughout the country.

The "vessel" concept is one of the most fundamental in maritime law because important consequences in many different contexts follow from the conclusion that a particular structure is (or is not) a "vessel."[6] Congress defined the term to "include[] every

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[6] For example, the Admiralty Extension Act, 46 U.S.C. § 30101, applies only when a vessel is involved. Seamen are entitled to unique personal-injury remedies if they are members of the crew of a vessel. *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). A maritime lien or a preferred ship mortgage can attach to a vessel. *See* Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§ 31301 *et seq*. The owner of a vessel has a unique right to limit its liability under the Limitation Act, 46 U.S.C. §§ 30501 *et seq*. Many more examples could be given.

description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. In *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013), this Court was required to decide whether a "floating home" satisfied that definition. To resolve the question, the *Lozman* Court announced a new test: "[A] structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the [structure's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." *Id.* at 121. It is probably self-evident that the *Lozman* test is at least as open-ended as the foreseeability test that has long been a part of the general maritime law; the views of a "reasonable observer" are no less "unpredictable" than the events that may be foreseeable. Indeed, the *Lozman* Court acknowledged that its "approach is neither perfectly precise nor always determinative." *Id.* at 128. "Nonetheless," it decided that its open-ended test was "workable" and would "offer guidance in a significant number of borderline cases where 'capacity' to transport over water is in doubt." *Id.* at 129.

One of the issues in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), was whether federal maritime law governed the case, and the answer turned on whether the bills of lading at issue were "maritime" contracts. The *Kirby* Court held that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract."

Id. at 27. On the facts in *Kirby* it was beyond dispute that the sea voyage from Sydney to Savannah was "substantial," just as it is clear in this case that the replacement of worn-out asbestos gaskets and insulation in petitioners' machines with new asbestos gaskets and insulation was "foreseeable." But the dividing line between substantial and insubstantial sea carriage is just as open-ended as the dividing line between foreseeable and unforeseeable future events.

This Court has frequently been required to decide whether a particular maritime worker qualifies as a seaman, and is thus entitled to personal injury remedies that are uniquely available to seamen under the Jones Act, 46 U.S.C. § 30104, and the general maritime law (but loses the benefits of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950). In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995), this Court held that a worker qualifies as a seaman only if he or she has "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature," among other requirements. The *Chandris* Court adopted a thirty-percent "rule of thumb" ("no more than a guideline") on the temporal aspect of its test, even while reiterating that "'[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it.'" *Id.* at 371 (quoting *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). The *Chandris* Court gave less guidance on what connection would qualify as "substantial in terms

of . . . its nature." On the contrary, it explained that "[t]he jury should be permitted . . . to consider all relevant circumstances." *Id.* at 369. Once again, the dividing line between a substantial and an insubstantial connection to a vessel is at least as open-ended as the dividing line between a foreseeable and an unforeseeable future event.

To give one final example, this Court has several times been required to identify the boundaries of admiralty tort jurisdiction. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 538-539 (1995), it held that a tort is "maritime" if it occurs on navigable waters and if "the incident involved was of a sort with the potential to disrupt maritime commerce," when described "at an intermediate level of possible generality," and if "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." That test—which determines not only whether a federal court sitting in admiralty has jurisdiction to hear a negligence case in which the foreseeability test may arise but also whether federal maritime law applies to a negligence claim regardless of the court that decides it—is open-ended on many levels. How much potential to disrupt maritime commerce is required? How great must the potential disruption be? Where are the dividing lines between an appropriate description and one that is too general or one that is too specific? How substantial does the relationship to a traditional maritime activity need to be? How traditionally maritime does the activity need to be?

The four cases discussed here, each relating to a fundamental aspect of maritime law, all demonstrate that maritime law does not require uniformity of expected outcomes. The uniformity principle instead requires that the same test be applied in courts throughout the country. The foreseeability test applied by the Third Circuit below does not even come close to raising a uniformity problem in a branch of the law that is filled with tests that are far more open-ended.

IV. THE RADICAL RULE ADVOCATED BY PETITIONERS IS INCONSISTENT WITH THE PRINCIPLES OF THE GENERAL MARITIME LAW AND WITH THIS COURT'S PRIOR DECISIONS

The rule that petitioners advocate is radical for many reasons. It rejects decades of precedent defining the standard that the general maritime law applies in negligence cases. It permits negligent actors to evade the consequences of their own negligence. And it implicitly conflicts with decisions of this Court permitting plaintiffs injured by defective products to recover from negligent defendants that did not make, sell, or distribute the products that caused the injury.

It is important to recognize just how broad a rule petitioners are advocating. They ask this Court to hold that "products-liability defendants" cannot "be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute." Pet. Br. i; *see also, e.g., id.* at 3, 13, 18, 36, 39, 52. Because in its current procedural posture, this is purely a negligence

case, *see supra* at 5-6, and this Court must assume that petitioners were in fact negligent, *see supra* at 7, they are actually seeking a rule that negligent (even grossly negligent) "products-liability defendants" cannot "be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute." Nothing in their analysis would limit the rule to asbestos cases. Their rule by its own terms protects far more than "bare metal" manufacturers. If adopted, it would protect a broad range of negligent actors in any context in which a defective product could injure a person.

A simple hypothetical illustrates the breadth of petitioners' proposed rule. Suppose that a cruise line purchases and installs a defective piece of equipment on its cruise ship. After the defective equipment seriously injures a member of the crew (such as one of the seafarers served by *amicus* PMI's members), a social visitor (such as Mr. Kermarec), and an independent contractor (such as the deceased worker in *Garris*), the cruise line knows beyond peradventure that the equipment is not only defective but also that it poses a serious risk of harm to anyone in its vicinity. Despite that knowledge, the cruise line does not replace the defective equipment, nor does it make any effort to repair it, nor does it warn anyone on board the vessel of the dangers that the equipment poses. Under the circumstances, the cruise line is at least negligent, and probably grossly negligent. But when the defective equipment thereafter injures an innocent passenger, and the passenger brings a negligence action under the

general maritime law to recover for her injuries, the negligent cruise line could raise petitioners' proposed rule as an absolute bar protecting it from liability. The innocent passenger's injuries were caused by the defective equipment—a product that the cruise line "did not make, sell, or distribute." Thus the cruise line could not be held liable under petitioners' proposed rule, and the innocent passenger would have no opportunity to prove that her injuries were caused not only by the defective equipment but also by the cruise line's negligence.

So far as *amicus*'s counsel knows, this Court has never faced a case like the hypothetical in the previous paragraph. Perhaps that is because petitioners' proposed rule is not in fact the law; cruise lines know that they will be held responsible for their own negligence if defective equipment on board the vessel injures someone, and they therefore take appropriate measures to replace or repair defective equipment (or at least to warn those who may come in contact with it). Alternatively, if such cases arise they are resolved before they reach this Court. But this Court has faced cases that would have been decided differently if petitioners' proposed rule actually were the law.

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), is a landmark decision in which this Court overruled *The Harrisburg*, 119 U.S. 199 (1886), to recognize a maritime-law cause of action for wrongful death. But

the case began when an allegedly[7] defective product caused a fatal injury to the plaintiff's husband:

> While [the plaintiff's husband] perform[ed] his regular duties as an employee of [a stevedoring] company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Moragne v. States Marine Lines, Inc., 211 So.2d 161, 162 (Fla. 1968).

Mr. Moragne's widow brought a wrongful-death action against the vessel owner alleging "both negligence and the unseaworthiness of the vessel." 398 U.S. at 376. In particular, she alleged (among other things) that the vessel owner was negligent in "fail[ing] to inspect, find and discover" the defective equipment and either remedy the defect or warn the decedent of it; in "fail[ing] to provide proper and adequate locking devices"; in "fail[ing] to keep the locking devices on the hatch beam, which caused the death of the deceased, in proper working order"; in "fail[ing] to inspect and discover the fact that the locking devices . . . were worn and did not function properly"; and in "fail[ing] to warn plaintiff's decedent . . . of the improper and unsafe

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[7] *Moragne* came to this Court after an interlocutory appeal under 28 U.S.C. § 1292(b) when the district court dismissed a portion of the complaint. *See* 398 U.S. at 376. As in the present case, the trial court had not yet made any factual findings, and the case was decided on the basis of the allegations in the complaint.

condition of the locking devices on [the] hatch beam." Appendix at 3, *Moragne* (No. 175) (reprinting Complaint ¶ 7). In other words, the plaintiff alleged that her husband's fatal injury had been caused by a defective product—the locking device on the hatch beam—that the defendant vessel owner had not made, sold, or distributed.

If petitioners' proposed rule were in fact the law, the vessel owner in *Moragne* would have been entitled to have the case dismissed. Even if negligent, it could not have been "held liable under maritime law for injuries caused by products that [it] did not make, sell, or distribute." But of course that is not what happened. This Court instead held "that an action does lie under general maritime law for death caused by violation of maritime duties," 398 U.S. at 409, even though the death was caused by a defective product that the defendant had not made, sold, or distributed.

Although the appeal focused on the plaintiff's unseaworthiness claim, the *Moragne* Court's statement of the rule that it adopted covered *any* "violation of maritime duties," thus including negligence—as this Court observed in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996). Indeed, a central aspect of the *Moragne* Court's reasoning relied on negligence cases. *See* 398 U.S. at 401 (citing *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960)). And in *Garris*, this Court unanimously confirmed that "[t]he maritime cause of action that *Moragne* established for unseaworthiness is equally available for negligence," 532 U.S. at 820,

because there is "no rational basis . . . for distinguishing negligence from seaworthiness," *id.* at 815. Finally, and perhaps most importantly, petitioners' proposed rule is so broad that it would have immunized the *Moragne* defendant from unseaworthiness liability just as readily as from negligence liability. Under any analysis, the result in *Moragne* would have been different if petitioners' proposed rule were actually the law.

CONCLUSION

The Third Circuit's judgment should be affirmed.

Respectfully submitted,

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